IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1004

GUADALUPE JIMENEZ, *et al.*,

Appellants,

—v.—

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT No. 2, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

GUADALUPE JIMENEZ, et al.,

Appellants

V.

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, et al.,

Appellees.

On Appeal from The
United States District Court for the
Southern District of Texas

JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Southern District of Texas, specially constituted pursuant to the provisions of Title 28, United States Code section 2284, which judgment dismissed Appellants' claim that the exclusion of their communities from the defendant water districts denied them

equal protection and due process of law. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the three-judge district court, filed October 2, 1975, is presently unreported. A copy of that opinion is attached to this Jurisdictional Statement at Page 1a of the Appendix. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 496 F.2d 113 (5th Cir. 1974), and a copy of that opinion is also located in the Appendix at Page 24a. The original opinion of the single-judge district court, dismissing this cause without convening a three-judge court, is also unreported and is printed in the Appendix at Page 35a.

JURISDICTION

This civil action for injunctive and declaratory relief was brought by Appellants under the authority of Title 42, United States Code section 1983, and of the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction was predicated upon Title 28, United States Code sections 1331, 1343, 2201 and 2202. Appellants asked the District Court to declare that Article 8280-3.2 of Vernon's Annotated Texas Civil Statutes was in violation of the United States Constitution and to enjoin the defendant water district directors from enforcing such provision.

By memorandum and order filed on August 15, 1973, a single-judge district court dismissed Appellants' suit and its companion case, Juan Fonseca v. Hidalgo County Water Improvement District No. 2, No. 72-B-180 (S.D. Tex.). The United States Court of Appeals for the Fifth Circuit, by judgment entered on June 17, 1974, reversed both decisions and remanded for consideration by a three-judge panel. The final judgment of the district court composed of three judges was filed and entered on October 2, 1975. A copy of the judgment from which this appeal is taken is located in the Appendix at Page 58a. Notice of appeal to this Court was filed in the District Court on November 19, 1975, a copy of which is included in the Appendix at Page 60a.

The jurisdiction of the three-judge district court was established pursuant to the provisions of Title 28, United States Code sections 2281 and 2284. The jurisdiction of this Court to review the decision of such a specially constituted district court by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b).

STATE STATUTE INVOLVED

Article 8280-3.2, Vernon's Annotated Texas Civil Statutes:

> Art. 8280-3.2 Water control improvement districts; exclusion of urban property
>
> Section 1. As used in this Act:

(a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other non-agricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written

consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Sec. 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Sec. 3. The Board of Directors of a district may by majority vote adopt a resolution calling a hearing to determine whether or not all or any part or parts of any urban property shall be excluded from the district. The resolution adopted by the Board of Directors shall describe the urban property proposed for exclusion by metes and bounds, by lots, blocks and subdivision or by other legal description so as to definitely identify the same, and such resolution shall set forth the purpose of the hearing as well as the date, time and place at which such hearing shall be had.

Sec. 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion,

and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

Sec. 5. If, as a result of such hearing, which may be continued from day to day, and from time to time until all persons entitled to be heard and who appear at said hearing have had an opportunity to be so heard and offer evidence, the said Board of Directors shall determine and find (a) that the owners of a majority in acreage of such urban property do not desire irrigation of the same; or

(b) that such urban property is not used or intended to be used for agricultural purposes; and

(c) that it would be to the best interest of said district and of the urban property proposed to be excluded or any part or parts thereof, that it be excluded from the district, said Board of Directors shall adopt a resolution setting forth such determina-

tion and findings and excluding the urban property or such part or parts thereof as to which such determination and findings are made. Should any canals, ditches, pipelines, pumps or other facilities of the district be located upon lands excluded in the resolution of the Board of Directors, such exclusion shall not affect nor interfere with any rights which the district might have to maintain and continue operation of the facilities as located for the purpose of servicing lands remaining in the district. A copy of said resolution excluding urban property from the district certified to and acknowledged by the Secretary of the Board of Directors shall be recorded by the district in the Deed Records in the county in which the excluded property is situated as evidence of such exclusion.

Sec. 6. From and after the adoption of a resolution by the Board of Directors excluding urban property the excluded property shall constitute no part of such district and shall have no further liability thereafter to said district for taxes, assessments or other charges of the district, but any taxes, assessments or other charges owing to the district at the time of exclusion shall remain the obligation of the landowner and shall continue to be secured by any and all statutory liens, if any.

Acts 1971, 62nd Leg., p. 814, ch. 86, eff. Aug. 30, 1971.

QUESTIONS PRESENTED

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?

2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?

3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATEMENT OF THE CASE

Appellants are residents of rural, unincorporated slum communities, known in Spanish as "colonias." Almost 100 such communities exist at the southern tip of Texas. The colonias residents are seeking to retain a voice in the policy-making processes of two local governmental units--water control and improvement districts organized under Chapter 51 of the Texas Water Code. Water control and improvement districts, or WCID's, are general purpose water districts having broad powers to provide a variety of municipal services needed by the plain-

tiffs' communities, including a safe domestic water supply, sewer and sanitation services, and drainage.

The fourteen named plaintiffs residing in nine separate colonias complain that they were denied the right to vote in water district elections by virtue of the exclusion of their communities from the two districts, residence being a qualification for exercise of the franchise. After the residents had been afforded the constructive notice contemplated by the statute in question, Article 8280-3.2, Vernon's Annotated Texas Civil Statutes, the board of directors of each district convened a hearing to determine whether the district and the properties being excluded would be benefited by the exclusion. On October 28, 1971 the Board of Directors of Hidalgo County Water Improvement District No. 2 ordered the exclusion of thirty-six rural subdivisions. Forty tracts were excluded by order of the Hidalgo and Cameron Counties Water Control and Improvement District No. 9 on September 6, 1972. The plaintiffs in the court below challenged the exclusion statute on three grounds: (1) that providing only constructive notice under the existing circumstances denied Appellants due process of law, (2) that the defendant district directors denied Appellants equal protection of the law by fencing them out of the electorate for impermissible political motives, and (3) that by providing only railroad companies with actual notice of the proposed exclusions, Article 8280-3.2 denies all other property holders equal protection of law.

On December 16, 1972 the complaint was filed by the named plaintiffs on behalf of themselves and a class composed of "all those persons whose lands were excluded from the Defendant Water Districts without actual personal notice to the owners or persons in possession of such lands and who do not want their lands excluded from the Defendant Water Districts." The Appellants were seeking to have their communities reinstated in the districts prior to the elections for district directors scheduled for January 9, 1973. However, the district court, shortly prior to the elections in question, denied Appellants' request for a preliminary injunction, requested the parties to stipulate the evidence insofar as possible, and established an expedited briefing schedule.

Shortly after the present suit was filed, Juan Fonseca and Efren Ramirez filed applications to have their names printed on the ballot as candidates for directors of Hidalgo County Water Improvement District No. 2. Fonseca and Ramirez were seeking to represent the interests of those residents who wanted the districts to provide municipal services as well as irrigation services. Their applications were rejected by the defendant directors on the ground that the candidates did not own land in the district subject to taxation, as required by the Texas Water Code, and another suit was filed against District No. 2 challenging the constitutionality of that provision of the Water Code. Fonseca v. Hidalgo County Water Improvement District No. 2, C.A. No. 72-B-180 (S.D. Tex.). By

agreement, the stipulations filed in the companion Fonseca case were also submitted in proof of the claims and defenses in the Jimenez suit. The district court, sitting as a single judge, filed its original Memorandum And Order on August 15, 1973, consolidating the two cases and dismissing both on the merits.

Appeals were taken by the plaintiffs in both cases, and the United States Court of Appeals for the Fifth Circuit ordered both remanded for consideration by a three-judge court, holding that the appellants' claims presented substantial federal constitutional questions. Jimenez v. Hidalgo County Water Improvement District No. 2, 496 F.2d 113 (5th Cir. 1974); Fonseca v. Hidalgo County Water Improvement District No. 2, 496 F.2d 109 (5th Cir. 1974). The opinions in both cases were filed on June 17, 1974.

Upon remand, the parties filed amended pleadings and additional stipulations of fact. Plaintiffs' Second Amended Complaint, filed on September 25, 1974, added a new cause of action, alleging that plaintiffs had been unconstitutionally "fenced out" of the district electorates because of the defendant directors' fears as to how they might vote in future general and bond elections. Oral arguments were heard before the Three-Judge Court on July 14, 1975, and the opinion and final judgment of the three-judge panel was filed on October 2, 1975. Essentially, the district court held (1) that there was no constitutional impediment to fencing the colonias residents out of the districts because of the

defendants' fears that they would vote against the interests of agricultural users of water, (2) that notice to the colonias residents by posting and publication was all that was constitutionally required of the districts prior to excluding the communities, and (3) that strong justification exists for providing railroads actual notice of the exclusions while providing all others only constructive notice. Appellants filed their notice of appeal to this Court on November 19, 1975.

THE QUESTIONS ARE SUBSTANTIAL

I. Plenary Review Of The District Court Decision Is Necessary To Settle Important Issues Of Federal Law Which Have Heretofore Not Been Resolved By This Court.

Most of America's migrant farm laborers live in South Texas; many make their homes in the "colonias" that dot the landscape in the Lower Rio Grande Valley. A typical colonia consists of a cluster of dilapidated, substandard two or three-room frame houses along an unpaved, rutted road. A typical water supply is a shallow, salty well, which frequently lies all too close to the sanitary system--an outhouse. Naturally, many of the wells are contaminated with human feces. Some residents draw their drinking water directly from the irriga-

tion canals that crisscross the area, even though the water is in a raw, untreated, and oftentimes polluted condition. Others are forced to transport their domestic water supply in makeshift carts, wagons and barrels from a safe municipal source. Not surprisingly, the two Valley counties of Hidalgo and Cameron, with only 3.03% of the Texas population, had 81.3% of the reported cases of amebiasis in 1971 and 68.1% of the cases of polio.

Holding the vast water resources of the region in trust for the people of the area are the water control and improvement districts that blanket the Valley. Water control and improvement districts, or WCIDs, organized under Article 16, Section 59 of the Texas Constitution and operating under Chapter 51 of the Texas Water Code (1972), have the power and authority to own, finance, construct, operate and maintain facilities for the treatment and distribution of water for domestic use, and have like powers to provide sewage, sanitation, and drainage facilities. However, neither of the Appellee districts have ever afforded any of the residents of their districts such services, preferring instead to devote virtually all of their resources to operating and maintaining an irrigation system. The residents of the colonias want the defendant WCIDs to exercise such of their statutory powers as will respond to their needs for water and sanitation services.

Rather than responding to those needs, the defendant directors have re-

sorted to a crude, but effective, method of frustrating the desires of the would-be municipal water users. Article 8280-3.2, V.A.T.C.S. was adopted by the Texas Legislature in 1971 at the behest of the Rio Grande Valley water district directors. The statute provides the directors a streamlined method for ridding themselves of the unwanted colonias by simply reading them out of the body politic. With no right of appeal available to the excluded residents, their interests are completely at the mercy of the incumbent directors.

The Appellees' exclusion mechanism raises several important federal constitutional issues that have not yet been decided by this Court. First, this Court has never decided whether the Due Process Clause requires actual notice to residents of a local political subdivision who the governing body propose to exclude from that subdivision. Secondly, the Court has not decided whether the directors of a political subdivision may, consistent with the Due Process Clause, exclude those whose political interests they perceive to be adverse.

The proliferation of local political subdivisions raises both of these heretofore undecided issues to a level of major national significance. Cities, counties, and school districts have been joined by a confusing milieu of municipal utility districts, fresh water supply districts, navigation districts, hospital districts, sanitation districts, watershed improvement districts, soil conservation districts, road districts, and water control

and improvement districts, seemingly ad infinitum. What has been created is a layer of virtually invisible government, a level of government that is sorely lacking in accountability to the citizenry it is to serve. The underlying theme of the present litigation is the accountability of this invisible government to its constituency. Sustaining Appellants' due process and equal protection claims would significantly advance that goal of accountability.

A. Appellants Were Denied Due Process Of Law In The Exclusion Of Their Property From The Water Districts Without Reasonable And Adequate Notice Of Their Rights To Be Heard On An Issue Of Substantial And Direct Interest.

Article 6, Section 2 of the Texas Constitution establishes as a qualification for voting in Texas elections, including those conducted by water districts, that the voter reside in the district in which he intends to vote. Therefore, when the Appellants' communities were neatly excised from the corporate territory of the districts, they were automatically denied the right to vote in district elections. It is for the redress of that loss of voting rights that the colonias residents appeal to this Court for due process protection.

One of the most pervasively articulated themes in modern Supreme Court jurisprudence has been the safeguarding of the structure of the political process. Striking down both practices that dilute the vote, Reynolds v. Sims, 377 U.S. 533 (1964); and Baker v. Carr, 369 U.S. 186 (1962); and those that result in the outright denial of the franchise, Carrington v. Rash, 380 U.S. 89 (1964); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972); Hill v. Stone, ___U.S.___, 44 L.Ed.2d 172 (1975), this Court has remained steadfast in its determination to protect the franchise, the fundamental political right that is "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, at 370 (1886).

The foregoing decisions were based upon Equal Protection claims; the Due Process Clause has only rarely been invoked in protection of voting rights. Nevertheless, this Court has sanctioned due process challenges to infringements upon the right to vote. In United States v. State of Texas, 252 F.Supp. 234 (W.D. Tex. 1966), aff'd, 384 U.S. 155 (1966), a 3-judge district court voided the Texas poll tax on due process grounds, stating that "it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the Due Process Clause." 252 F.Supp. 234, at 250. Appellants submit that their plight is another of those uncommon circumstances where the

Due Process Clause affords protection for their right to vote.

The fundamental error of the district court in its treatment of the due process question was its failure to recognize the distinction between annexation, consolidation, and similar boundary changes, on the one hand, and the exclusion situation confronting Appellants, on the other. Citing Falbrook Irrigation District v. Bradley, 164 U.S. 112 (1896) and Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939), the lower court did not recognize the loss of Appellants' political rights as a "loss of constitutional dimensions." Opinion of the Three-Judge District Court, Page 17a. In the cited cases political rights were being created, not destroyed. That circumstance contrasts sharply with the present litigation. Since 1920 in the case of one of the Appellee districts and 1928 in the case of the other, Appellants had been vested with the right to vote and to participate in the political affairs of the districts; those rights were divested when Appellants were excluded from the districts. It is that divestiture of rights without adequate notice and an opportunity to be heard that plaintiffs protest. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Strong policy factors existing in the exclusion situation demand different procedural standards for the protection of those being excluded. Claims similar to plaintiffs' were raised four years ago

in Thompson v. Whitley, 344 F. Supp. 480 (E.D. N. Car. 1972, 3-judge ct.), where landowners were protesting on equal protection grounds the annexation of their property to a city without allowing them the right to vote on the annexation. In deciding not to impose the strict "compelling state interest" standard of review, the Court noted as follows:

> Indeed, the newly annexed citizens brought into the township over their protest may thereafter vote in township elections and have their votes counted fully to influence township decisions--including future annexations and perhaps even de-annexation. Id., at 484.

The distinction between annexation and exclusion is starkly clear when the Jimenez case is compared to Thompson. The plaintiffs here do not have the usual political remedy available to those who have been unwillingly annexed. The colonias residents have no power now over those who made the decision to exclude them. If for no other reason, the balancing of interests dictates the necessity of providing the residents in the excluded areas a real--not a sham--opportunity to be heard.

Once it is determined that due process requires notice and a fair hearing prior to exclusion, the question then becomes the quantum of notice to be afforded. The answer to that question has already been provided in the leading case of Mullane v. Central Hanover Bank & Trust

Company, 339 U.S. 306 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... The notice must be of such nature as reasonably to convey the required information.... 339 U.S. 306, at 315.

A case strikingly similar to the present litigation was before the Court in 1962. Schroeder v. City of New York, 371 U.S. 208 (1962). The City of New York, prior to diverting part of the flow of the Neversink River, provided notice to the property owners along the river by posting and by publication in two newspapers. That notice was found to be insufficient to bar a property owner's claim for damages for impairment of the use of the river for bathing, swimming, fishing, and boating, an impairment that resulted from a decrease in the velocity of flow of the river. Whereas Mrs. Schroeder invoked the Due Process Clause to protect her property interests, Guadalupe Jimenez invoked the same protection for his "fundamental interest in liberty." See also Armstrong v. Manzo, 380 U.S. 545 (1965); Sniadach v. Family Finance Co., 395 U.S. 337 (1969); Goldberg v. Kelly, supra; Wisconsin v. Constantineau, supra.

In response to Appellants' challenges under both the Due Process and Equal Protection Clauses the districts have sought refuge behind the sweeping language of this Court's opinion in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), and its progeny. The broad generalizations of the Hunter opinion, purporting to leave the states absolutely free to do as they will with their political subdivisions, were sharply restricted some fifty-three years later in Gomillion v. Lightfoot, 364 U.S. 339 (1960). Mr. Justice Frankfurter stated in his opinion for the Court as follows:

> Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that give rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. 364 U.S. at 343-344.

* * *

> This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. 364 U.S. at 344-345.

Hence, whatever non-justiciability notions might have been present in Hunter were laid to rest in Gomillion. The districts' actions, therefore, are not immune from review.

B. The Exclusion Of Appellants' Communities From The Districts For Impermissible Political Motives Denied Appellants The Equal Protection Of Law.

The stipulated evidence and the Appellees' own judicial admissions confirmed the plaintiffs' original suspicions that the exclusion statute was a device created by the Valley water districts for the purpose of fencing the colonias out of the districts for the constitutionally impermissible reason that the urban residents constituted a political threat to continued farmer control of the

districts. In short, the colonias residents have been the victims of an invidiously discriminatory political gerrymander. They have been "fenced out" of the water district electorates because of the defendants' fears of the "political mischief" they might cause.

Just as Gomillion v. Lightfoot, supra, prohibits a racially motivated gerrymander under the Fifteenth Amendment, the Fourteenth Amendment is likewise a bar to political gerrymanders. The Equal Protection Clause prohibited the State of Texas from fencing servicemen out of the county electorate in Carrington v. Rash, 380 U.S. 89 (1965):

> "Fencing out" from the franchise a sector of the population because of the way they might vote is constitutionally impermissible. "The exercise of rights so vital to the maintenance of democratic institutions," Schneider v. State, 308 U.S. 147, 161, 84 L.Ed. 155, 165, 60 S.Ct. 146, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. 380 U.S. 89, at 94.

That obliteration is exactly what the defendant directors have accomplished by Article 8280-3.2. See also Evans v. Cornman, 398 U.S. 419 (1970).

Although this Court has on previous occasions indicated that legislative districts may not be drawn so as to invidiously discriminate against or cancel out

political elements of the voting population, Gaffney v. Cummings, 412 U.S. 735 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Abate v. Mundt, 403 U.S. 182 (1971); that indication has not been applied as yet to invalidate a boundary-drawing scheme. Article 8280-3.2 presents the Court with an obvious example of the need for such a ruling.

II. The District Court Decision Is In Conflict With Applicable Decisions Of This Court.

Section 4 of Article 8280-3.2, V.A.T.C.S., after stating the requirements for notice to ordinary people, then establishes the following requirements for notice to a railroad company:

> In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll. Acts 1971, 62nd Leg., p. 814, Ch. 86, Sec. 4.

The classification in the statute is one between railroads, on the one hand, and all other natural persons and corporations on the other. The lower court fell into error by its characterization of the interests the Appellants were asserting. The district court, in a footnote, indi-

cated that the Appellants merely had an interest in receiving "notice of local legislative proceedings." By not recognizing Appellants' fundamental interest in protecting their voting rights, the lower court required the defendants to bear the fairly nominal burden of showing that the differing treatment for railroads bears some rational relationship to a permissible state objective. The court found justification for actual notice to railroads on the basis that only railroads had such widespread holdings that it would be a burden upon that type of corporation, and no others, to have to rely upon constructive notice.

Of course, the defect in the lower court's reasoning is in its treatment of the Appellants' interest. Had that court recognized the natural and intended consequence of Appellees' actions--the foreclosure of the colonias dwellers' voting rights, then a more rigorous standard of review would surely have been imposed. The district directors would have been required to show that the classification favoring railroads with actual notice was reasonably necessary to promote a compelling state interest. Dunn v. Blumstein, 405 U.S. 330 (1972). Even assuming, arguendo, that railroads have a difficult task in obtaining information regarding the actions of local governmental bodies, it is unreasonable to assume that only railroads are so disadvantaged. Not only is the classification unreasonable on its face, the state interest being advanced remains well hidden. The 2,958 excluded residents

of District No. 2 are equally as deserving of actual notice, by first class mail, as are the railroads.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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January, 1976.

APPENDIX

OPINION OF THE

THREE-JUDGE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE ROBLES, ISABEL CERVANTES, MARIO RODRIGUEZ, PABLO ALBISO, ALBINO OVIEDO, ESPERANZA SAENZ, RAMIRO GARCIA, JUAN RAMOS, ERASMO MEDELES, MAGDELENO MONTES, AMELIA MARAMILLO (sic), MARCOS LANDEROS and MARTIN GONZALEZ	X	
V.	X	Civil Action No. 72-B-171
HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, A. E. ELLIOTT, GEORGE HINKLE, E. R. RUSSELL, E. W. GENENWEIN, WILLIAM BUSCH, HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMP. DISTRICT NO. 9, RALPH POWELL, S. H. TURBERVILLE, KIRK SCHWARZ, B. J. HELLER and TOM SOLETHER	X	

American Civil Liberties Union Foundation (Melvin Wulf, Joel Gora and Burt Neuborne), of New York City; and American Civil Liberties Union Foundation-South Texas Project

(David G. Hall) of San Juan, Texas; for Plaintiffs.

Atlas, Hall, Schwarz, Mills, Gurwitz & Bland (Morris Atlas and Harry L. Hall), of McAllen, Texas; for Defendants Hidalgo County Water Improvement District No. 2, Its Officers, Directors and Manager.

Smith, McIlheran, McKinney & Yarbrough (Garland F. Smith), of Weslaco, Texas; for Defendants Hidalgo and Cameron Counties Water Control and Imp. District No. 9, and Its Directors.

Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis (Glenn Jarvis and Neil Norquest), of McAllen, Texas; for Amicus Curiae Donna Irrigation District, Hidalgo County Number One.

Neal King, of Mission, Texas; for Amici Curiae Water Districts.

MEMORANDUM AND ORDER

Before GEE, Circuit Judge, GARZA and COX, District Judges.

GEE, Circuit Judge:

This suit is brought by plaintiff Guadalupe Jimenez and thirteen other named plaintiffs, former residents of defendant Hidalgo County Water Improvement District No. 2 or defendant Hidalgo

and Cameron Counties Water Control and Improvement District No. 9, against certain directors of the two defendant water districts, in their official capacities only. Plaintiffs sue for a class comprising all those persons whose lands have been excluded from the defendant water districts without actual personal notice to the owners thereof, or persons in possession of such lands and who do not want their lands excluded from the defendant water districts.

Plaintiffs seek an injunction setting aside the January 1973 water district elections and ordering defendants to hold new elections in each of defendant water districts, since by reason of the exclusion of their lands from such districts plaintiffs were unable to vote in the January water district elections and will be unable to vote in future water district elections. In addition, they would have this court enjoin defendants from excluding "urban property" as defined in Article 8280-3.2, TEX. REV. CIV. STAT. ANN., from the corporate boundaries of the defendant water districts and would have this court declare both that Article 8280-3.2 is unconstitutional on its face and as applied to them and the class they represent and that the action of defendants in excluding "urban property" pursuant to such statute is null and void and of no effect at law.

Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343, 2201 and 2202; upon 42 U.S.C. § 1983; and upon the Fifth and Fourteenth Amendments to the Constitution of the United States. This three-

judge court was convened by order of the United States Court of Appeals for the Fifth Circuit. Jimenez v. Hidalgo County Water Improvement District No. 2, 496 F. 2d 113 (5th Cir. 1974).

The facts of this case are stipulated and have been found by this court to be as stipulated.

Defendant water districts are political subdivisions of the State of Texas, similar to municipalities and other special-purpose districts governed by state statutes. The two districts were organized pursuant to Article 16, § 59 of the Texas Constitution and are governed by Chapter 51 of the Texas Water Code. The state legislature has delegated to such water control and improvement districts the authority to administer the state's water resources by means of their respective water rights. Water districts have been granted broad powers to effectuate their purposes, e.g., the power of eminent domain, the power to acquire property, the power to tax for certain purposes, the power to borrow money and issue bonds, the power to make contracts and engage in large-scale construction projects, and the power to hire numerous employees to implement the goals of the district and enforce district regulations. See generally Chapter 51, TEXAS WATER CODE. In essence, water districts have been endowed by the legislature with all powers necessary to carry out their purposes. Each district operates through a board of directors, each of whom must own land within the district.

Plaintiffs herein complain of the exclusion of their lands from the defendant districts. A preliminary examination must therefore be made of the procedure used in excluding such lands. Article 8280-3.2, TEX. REV. CIV. STAT. ANN., the statute challenged in this lawsuit, reads, in pertinent part, as follows:

> Art. 8280-3.2 Water Control improvement districts; exclusion of urban property
>
> Section 1. As used in this Act:
>
> (a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other non-agricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or

agricultural purposes.

(b) "District" means any water control and improvemenet district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Section 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Provision is then made for hearing and notice which will be hereinafter discussed.

Preamble

The alteration of the boundaries of political subdivisions by the state is a political function entirely within the power of the state legislature to regu-

late. This principle was enunciated by the Supreme Court in 1907, in the case of Hunter v. City of Pittsburgh, 207 U.S. 161. The Court stated, at pages 178 and 179:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally and unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislature body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

> Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

In Detroit Edison Co. v. East China Township School District, 378 F.2d 225 (6th Cir.), cert. denied, 389 U.S. 932 (1967), the court held that any alteration of municipal boundaries was completely discretionary with the State and not confined by any rights secured by the federal Constitution. The Fifth Circuit Court of Appeals, in affirming a case appealed from this court, has stated that in regard to annexations: "[T]he annexation of lands to a city has been held without exception to be purely a political matter entirely within the power of the State Legislature to regulate." Hammonds v. City of Corpus Christi, Texas, 343 F.2d 162, 163 (5th Cir.), cert. denied, 382 U.S. 837 (1965). See also, Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir.), cert. denied sub nom, Ocean Hill Country Club, Inc. v. Knoxville, 389 U.S. 975 (1967). It is therefore clear that the power of political subdivisions of states, such as municipalities and water

districts, to alter their boundaries, is almost absolute as far as the federal Constitution is concerned.

Gerrymandering

Plaintiffs, however, first object to the exclusion of their urban areas pursuant to state law as a political gerrymander. At the outset they characterize their line of attack generally: "[T]he Defendants denied Plaintiffs equal protection of the law by fencing them out of the electorate for political reasons." In the body of their argument the attack is sharpened and particularized:

> Article 8280-3.2 has, in effect as well as purpose, countenance a political gerrymander.[1] Here the gerrymander is not directed solely to a class defined by race or national origin, but rather it is directed against a class of urban residents--a class which poses a threat to Defendants' irrigation programs when presented in the form of bond elections and a class which poses a threat to Defendants' continued political control of the Districts. As Mr. Justice Frankfurter observed in Gomillion v. Lightfoot, 364 U.S. 339, at 347 (1960):
>
> > While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in

> geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.
>
> By substituting "urban" for the word "colored" in that statement, Justice Frankfurter described the Defendants' actions here. (footnote added).

Finally, the argument is rounded out by analogy to such authorities as Carrington v. Rash, 380 U.S. 89 (1965) and Evans v. Cornman, 398 U.S. 419 (1970), involving manipulation of state residency requirements to deny the general franchise to servicemen or to residents of federal enclaves. Though the position is ingenious, we are not persuaded.

The summons to us, in the name of Gomillion, to pursue the gerrymander into the depths of the political thicket is one which has been often ignored[2] or declined[3] by the Supreme Court: the trumpet has not given even an uncertain sound, it has lain all but mute. And Gomillion, which might once have appeared the thin entering wedge of the amendments into state gerrymandering, with the Fifteenth shortly to be joined in the breach by the Fourteenth, etc., has suffered a different fate. In its more recent expressions, the Court has seemed to see the case more as a specific instance of the general invalidity of racially-motivated official actions than as one primarily concerned with the gerrymander. It has, for example, not been four months since Mr. Justice White, writing for the Court in a case involving an annexation attacked as

racially motivated, cast Gomillion's effect as follows:

> An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 [of the Voting Rights Act of 1965, 42 U.S.C. § 1973c] forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citziens, of their theretofore enjoyed voting rights." Gomillion v. Lightfoot, 364 U.S. 339, 347, 5 L.Ed.2d 110, 81 S.Ct. 125 (1960). Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end...." Western Union Telegraph Company v. Foster, 247 U.S. 105, 114, 62 L.Ed. 1006, 38 S.Ct. 438, 1 A.L.R. 1278 (1918); Gomillion v. Lightfoot, supra, at 347, 5 L.Ed.2d 110, 81 S.Ct. 125. An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be. (emphasis added.)

City of Richmond v. United States, ___ U.S.___, 45 L.Ed.2d 245, 260 (1975). Nor

is this development of Gomillion, if such it be, surprising, for the opinion itself makes plain that it dealt with something over and beyond "familiar abuses of gerrymandering."[4]

Here we face, at worst, such a familiar abuse. Were we to accept in full plaintiffs' view of defendants' actions--that they represent a politicized drawing of boundaries having as its aim precisely and nothing but the perpetuation in power of the dominant body in a state political subdivision--plaintiffs would confront nothing that minority political bodies have not faced, in the South and elsewhere, from time immemorial.[5] That the practice is odious and unfair is too patent to require discussion; we take it as granted. But much in the political process is, or may be made, unfair, and we hold no general warrant to correct inequity. The United States and all state Constitutions contemplate representative, rather than town-meeting, government in the legislative branch. So long as this is so it will be possible that the views of any minority in any given political subdivision will go unrepresented, except insofar as the sense of fairness of the representative elected by the dominant faction moves him to give it voice and effect. One such view will be on how boundaries of political subdivisions should be drawn, and into the opposing views on this question will doubtless sometimes enter unfortunate considerations of maximizing the voting power of some political blocs and dispersing that of others on a territorial basis--gerrymandering. But, though Gomillion[6] teaches that this may

not be done on racial grounds, courts have stood abashed before its accomplishment on others, finding no constitutional tool to apply and, perhaps, fearing that judicial intrusion so near the heart of the political process would be a desperate remedy worse than the disease.

Nor do such cases as Carrington[7] or Cornman[8] aid plaintiffs' case, for they are clearly distinguishable. Each involves denial of the franchise to persons who are to remain within and subject to the political entity in which they seek to vote. And Mr. Justice Marshall, writing for the Court in Cornman, places the Court's decision that Maryland could not deny the franchise to domiciliaries of a federal enclave squarely on the basis of the broad powers exercised over the domiciliaries and their property by Maryland. The core of his opinion centers on the trial court's finding that the plaintiffs "...are treated by the State of Maryland as state residents to such an extent that it is a violation of [the Equal Protection Clause of] the Fourteenth Amendment for the State to deny them the right to vote."[9] Our plaintiffs, to the contrary, are not part of or subject to the water district excluding them at all, for by the act of exclusion it renounced all power over them or their property. Plaintiffs' claim is beyond our warrant, and their invitation to rewrite Gomillion--and the Fifteenth Amendment--to read "urban" for "race" or "color" must be declined. Such a revision is beyond our competence and, if to be taken in hand by judges, must be by those from whose decisions there is no appeal.

Sufficency (sic) of Constructive Notice

A major issue in this case is one of the sufficiency of notice. Plaintiffs' argument rests largely upon the fact that each individual plaintiff and members of the class plaintiffs represent did not receive personal notice of the hearings concerning exclusion of their lands from the districts. Article 8280-3.2, the statute plaintiffs herein attack, sets forth the requirements for notice prior to exclusion of lands from a water district. It has been stipulated between the parties that the provisions of Article 8280-3.2 were complied with by both districts. Plaintiffs contend, however, that Article 8280-3.2 notice is insufficient. This court does not agree.

Section 3 of Article 8280-3.2 provides for the adoption of a resolution by the board of directors of a water district calling for a hearing to determine whether or not all or part of any urban property shall be excluded from the district. The resolution is to set forth a description of the property to be excluded, and the date, time and place such hearing is to be held.

The notice provisions of Article 8280-3.2 are as follows:

> Section 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district

> or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

The statute proceeds to provide that such a hearing may be continued from time to time until all persons who appear and are entitled to be heard have been heard and that thereafter the board of directors shall determine and find,[10] before excluding it, that such urban property is not used or intended to be used for agricultural purposes, that it would be in the best interest of the district and of the urban property to exclude such property and that the owners of a majority in acreage of such urban property do not desire irrigation of their property.

Plaintiffs contend that Article 8280-3.2 is unconstitutional on its face because it does not provide for notice to

each individual landowner affected by the exclusion of urban property, that it creates a favored class as regards notice, i.e., the railroad, and that plaintiffs, who are largely of Mexican-American descent, should have received not only individual notice but notice in the Spanish language.

Notice of the type required by Article 8280-3.2 is the type provided for in almost all states when personal notice is not required. Examples of some proceedings in Texas of which notice may be given by publication or posting or both are: (1) the annexation of additional territory by drainage districts or conservation and reclamation districts, TEX. REV. CIV. STAT. ANN. art. 8176b; (2) the creation or extension of navigation districts, TEXAS WATER CODE ANN. § 61.028; (3) the annexation or deannexation of territories by cities, TEX. REV. CIV. STAT. ANN. art. 970a §§ 6 and 10c; (4) the creation of fresh water supply districts, TEXAS WATER CODE ANN. §§53.016 to 53.019, inclusive; and (5) the exclusion of lands from fresh water supply districts, TEXAS WATER CODE ANN. § 53.233.

Reasons for choosing the method of notice provided in Article 8280-3.2 are manifest. For example, within Hidalgo County Water Control and Improvement District No. 2, a defendant herein, there are some 2,061 property owners owning more than one acre of land in the district. If landowners in excluded areas are entitled to notice, certainly the remaining landowners would be entitled to notice also, as their property would be subjected

to greater taxes because of the decreased area. There are approximately 2,958 owners of lots in the excluded areas. Personal notice to all landowners in both English and Spanish would mean that some 10,000 notices to over 5,000 owners would have to be sent. A similar problem would confront defendant District No. 9.

In fixing the boundaries of political subdivisions,

> [T]he legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question.

Falbrook Irrigation District v. Bradley, 164 U.S. 112, 174-75 (1896). See also, Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939). As the aforementioned cases indicate, plaintiffs have not suffered and will not suffer a loss of constitutional dimensions, and therefore the quantum of notice to be afforded plaintiffs will be gauged accordingly. Plaintiffs' reliance on such cases as Schroeder v. City of New York, 371 U.S. 208 (1962), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Mullane v. Cen-

tral Hanover Bank and Trust Co.,339 U.S. 306 (1950), is misplaced. Each of those cases involved an existing, tangible property interest, as opposed to what here seems to be at best an intangible, possible future interest of undetermined nature. Notice similar to the notice provided for in Article 8280-3.2, i.e., by publication, has routinely been upheld in cases concerning the formation of water districts. Orr v. Allen, 245 F. 486 (N. D. Ohio 1917), aff'd 248 U.S. 35 (1918); San Saba County Water Control and Improvement District No. 1 v. Sutton, 12 S.W.2d 134 (Tex. Comm'n App. 1929, jdmt. adopted); Tarrant County Water Control & Improvement District No. 1 v. Pollard, 12 S.W. 2d 137 (Tex. Comm'n App. 1929, opinion adopted). See also, Rutledge v. State, 7 S.W.2d 1071 (Tex. 1928).

This court, therefore, holds that the personal notice to landowners of the exclusion of lands from a water control and improvement district is not required and, therefore, that the notice provisions of Article 8280-3.2 are constitutional.

Equal Protection: Actual Notice to the Railroads

Plaintiffs also contend that the notice provision of Article 8280-3.2 is unconstitutional in that it denies them equal protection of the laws. They point to the provision of the statute which allows them to be notified of the exclusion proceedings constructively but requires that railroads be given actual notice by mail. This, they say, creates categories

and treats them differently.

There is, of course, no doubt that Texas, in exacting the notice provision of Article 8280-3.2, chose to treat the railroads differently from other persons, both real and corporate. But neither the creation of categories nor differentiations in treatment are per se violations of the Equal Protection Clause. Even when suspect categories or fundamental rights are involved, a state may treat different groups differently if there exists a compelling governmental interest in doing so. And when, as here, the legislation attacked involves neither fundamental rights[11] nor classifications based upon suspect criteria, it will be sustained unless it discriminates invidiously or unless the classification and differing treatment bears no rational relationship to a permissible state objective. See Schilb v. Kuebel, 404 U.S. 357, 364-65 (1971). The discrimination between railroads and all others is by no means invidious. Moreover, since an obvious objective of the notice provision of Article 8280-3.2 is to insure that all interested parties have a reasonable opportunity to be apprised of the potential exclusion of their property from a water control and improvement district, there is certainly strong justification for providing for special notice to railraods. Railroads run from coast to coast and throughout Texas. Each of some 254 counties in Texas contain numerous political subdivisions, school districts, cities and other agencies of the state capable of affecting the railroads' interest through taxes or otherwise. For a railroad company cover-

ing a large area, the task of acquainting itself with the activities of a multitude of state and local agencies would be monumental. Thus, it was rational for the Texas Legislature to suppose that in order for the railroads to be apprised of local happenings they, more than local residents or landowners, would need actual notice. And it was permissible for it to provide that such notice be given them.

Having dealt with plaintiffs' contentions, we conclude that the relief sought by them must be DENIED.

THOMAS GIBBS GEE
United States Circuit Judge

REYNALDO G. GARZA
United States District Judge

OWEN D. COX
United States District Judge

FOOTNOTES

1. It should be borne in mind that plaintiffs' basic attack is on the Texas statute, it being argued by all that the statutory procedure for exclusion was correctly followed.

2. E.g., although political gerrymandering was an issue and was discussed by the district court in Graves v. Barnes, 343 F.Supp. 704, 734 (W.D. Tex. 1972), the Supreme Court failed to even mention the question in affirming in part and reversing in part, White v. Register, 412 U.S. 755 (1973).

3. In Gaffney v. Cummings, 412 U.S. 735, 37 L.Ed.2d 298, 93 S.Ct. 2321 (1973), a somewhat diffuse spray of cold water was made to play on the complaints there made of political gerrymandering. See text discussion at 412 U.S. 751-54, 37 L.Ed.2d 311-13, 93 S.Ct. 2330-32 and footnote 18, loc sit, remarking:

> Appellees also maintain that the shapes of the districts would not have been so "indecent" had the Board not attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. That may well be true, although any plan that attempts to follow Connecticut's "oddly shaped" town lines (App. 98) is bound to contain some irregularly shaped districts. But

compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts. Cf. White v. Weiser, 412 U.S. 783, 37 L. Ed.2d 335, 93 S.Ct. 2348; Wright v. Rockefeller, 376 U.S. 52, 54, 11 L.Ed.2d 512, 84 S.Ct. 603 (1964, and id., at 59-61, 11 L. Ed.2d 512 (Douglas, J., dissenting).

4. 364 U.S. 339, 341.

5. In posing the hypothetical--and it is only a hypothetical, we make no finding--we have in mind the alleged intentions of the districts' directors, who, by their actions, excluded the plaintiffs' land. Courts do not presume that state legislatures have acted in bad faith. Nor does the intent of the legislature invalidate otherwise constitutional legislation. Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968); Fletcher v. Peck, 10 U.S. (6 Cr ch) 87 (1810). The same rule applies here.

6. And a myriad voting rights cases, such as Gaffney v. Cummings, 412 U.S. 735 (1973); Wright v. Rockefeller, 376 U.S. 60 (1964); Gilbert v. Sterrett, 509 F.2d 1389 (5th Cir. 1975); Cousins v. City Council of the City of Chicago, 466 F.2d 830 (7th Cir.), cert. denied, 409 U.S. 893 (1972).

7. Carrington v. Rash, 380 U.S. 89 (1965).

8. Evans v. Cornman, 398 U.S. 419 (1970).

9. 398 U.S. 419, 424-25.

10. As it did in this case, findings which are not attacked before us.

11. The right to vote is, of course, fundamental, but the statute does not concern itself with classification and voting but rather with classification and notice of local legislative proceedings. There is no fundamental right for all to receive notice of each happening within the political sphere.

OPINION OF THE

COURT OF APPEALS

Guadalupe JIMENEZ et al.,
Plaintiffs-Appellants,

V.

HIDALGO COUNTY WATER IMPROVEMENT
DISTRICT NO. 2 et al.,
Defendants-Appellees.

No. 73-3557.

United States Court of Appeals,
Fifth Circuit.

June 17, 1974.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Plaintiffs filed this complaint for declaratory and injunctive relief on their own behalf and on behalf of a class of persons similarly situated "composed of all those persons whose lands were excluded from the Defendant Water District without actual personal notice to the

owners of persons in possession of such lands . . . who do not want their lands excluded from the Defendant Water District." They specifically assert the unconstitutionality of article 8280-3.2, Vernon's Tex. Ann. Civ. St., under which the action of the defendant water districts occurred and pursuant to which constructive public notice of a meeting of the district for the purpose of excluding certain lands from the district was made by publication and posting, and not by personal notice to the members of the class.1

1. Vernon's Ann. Tex. Civ. St. article 8280-3.2 reads in full as follows:
Section 1. As used in this Act:
(a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other nonagricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to

Note 1--Continued

include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged, in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Sec. 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Sec. 3. The Board of Directors of a district may by majority vote adopt a resolution calling a hearing to determine whether or not all or any part or parts of any urban property shall be excluded from the district. The resolution adopted by the Board of Directors ahll describe the urban

Note 1--Continued

property proposed for exclusion by metes and bounds, by lots, blocks and subdivision or by other legal description so as to definitely identify the same, and such resolution shall set forth the purpose of the hearing as well as the date, time and place at which such hearing shall be had.

Sec. 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

Note 1--Continued

Sec. 5. If, as a result of such hearing, which may be continued from day to day, and from time to time until all persons entitled to be heard and who appear at said hearing have had an opportunity to be so heard and offer evidence, the said Board of Directors shall determine and find (a) that the owners of a majority in acreage of such urban property do not desire irrigation of the same; or

(b) that such urban property is not used or intended to be used for agricultural purposes; and

(c) that it would be to the best interest of said district and of the urban property proposed to be excluded or any part or parts thereof, that it be excluded from the district, said Board of Directors shall adopt a resolution setting forth such determination and findings and excluding the urban property or such part of parts thereof as to which such determination and finds are made. Should any canals, ditches, pipelines, pumps or other facilities of the district be located upon lands excluded in the resolution of the Board of Directors, such exclusion shall not affect nor interfere with any rights which the district might have to maintain and continue operation of the facilities as located for the purpose of servicing lands remaining in the district. A copy of said resolution excluding urban

Note 1--Continued

property from the district certified to and acknowledged by the Secretary of the Board of Directors shall be recorded by the district in the Deed Records in the county in which the excluded property is situated as evidence of such exclusion.

Sec. 6. From and after the adoption of a resolution by the Board of Directors excluding urban property the excluded property shall constitute no part of such district and shall have no further liability thereafter to said district for taxes, assessments or other charges of the district, but any taxes, assessments or other charges owing to the district at the time of exclusion shall remain the obligation of the landowner and shall continue to be secured by any and all statutory liens, if any.

Acts 1971, 62nd Leg., p. 814, ch. 86, eff. Aug. 30, 1971.

On October 28, 1971, the board of directors of defendant Hidalgo County Water District No. 2 ordered the exclusion of 36 rural subdivisions in which plaintiffs and their class reside. On September 6, 1972, the board of directors of defendant Hidalgo and Cameron Counties Water Control and Improvement District No. 9 excluded 40 of such subdivisions. These are very large water districts situated in the most populous regions of the Lower Rio Grande Valley at the southernmost tip of Texas.

Plaintiffs complain that they have been deprived of their right to vote for members of the board of directors of the defendant water district of the districts' action in excluding the areas in which they live from the territorial limits of the defendant water districts. Under Vernon's Ann. St. Texas Constitution, article 6, §2, a person must reside in the district in which he intends to vote. Plaintiffs desire to assert the right to vote for directors so that eventually they may be able, through directors elected by them, to change the policy of the defendant water district from one primarily devoted to irrigation for agriculture to one also engaged in providing domestic water and sanitation services for the poor unincorporated rural areas (colonias) in which they and their class reside. Thus exclusion of the territory in which they live by action of defendant boards, pursuant to the constructive notice provisions of article 8280-3.2, is, they assert, an unconstitutional deprivation of their

right to vote, contrary to the Fourteenth Amendment and the due process clause thereof.

Plaintiffs contend that the constructive notice contemplated by article 8280-3.2 fails to comply with procedural standards required by the due process clause when political subdivisions of a state, such as the water districts here, exclude a substantial number of the residents of those districts thereby terminating their political rights within the subdivision, including any rights to receive services from these political units. They cite decisions of the Supreme Court on the issue of the sufficiency of notice under the due process clause, such as the leading case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); also Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), and others. They contend that a real opportunity to be heard must be offered by a water district which proposes to de-annex the property of numerous citizens from the limits of the district. They aver that since 1920, in the case of San Juan District (Water District No. 2), and since 1928, in the case of Mercedes District (Water District No. 9), the plaintiffs and their class have been divested by the defendant water districts with only the constructive notice to affected citizens by publication and posting.

Plaintiffs assert that none of the plaintiffs or their class received any

actual notice of the hearings which were to consider exclusion of their communities from the districts; that the predominant language of most of the residents of the colonias is Spanish and many do not read, write or understand the English language; that the names and addresses of the persons affected by the exclusion were readily available in the public records of the Hidalgo County Tax Assessor-Collector and it would have been possible to have copied these names and addresses from the tax records so that actual notice could have been given. Plaintiffs contend, therefore, that insufficiency of notice had deprived them of their right to a hearing.

On the other hand, the defendant water districts contend that the type of notice complained of in this case is universally provided in similar proceedings in practically every state in the Union and that it would be a practical impossibility to give the kind of notice which plaintiffs contend is minimally required by the due process clause. They point out that similar notice provisions have been upheld by the Texas Surpeme Court in Tarrant County Water Control & Improvement District No. 1 v. Pollard, Attorney General, 118 Tex. 138, 12 S.W.2d 137 (1929); Rutledge v. State, 117 Tex. 342, 7 S.W.2d 1071 (1928) and Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927). Defendants also contend that the cases cited by plaintiffs, such as Mullane and Schroeder, supra, are not authority for the proposition that in this type of exclusion

proceedings on property from the boundaries of a water control district, personal notice by mail is required nor is the type of notice one required in judicial proceedings.

Defendants cite the leading case of Hunter v. Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L.Ed. 151 (1907), to the effect that the territory over which political subdivisions of the state shall exercise authority rests in the absolute discretion of the state. This is true, defendants argue, unless there is clear encroachment upon the provisions of the Fourteenth Amendment. Thus they conclude that the determination of what property should originally be included in water control and improvement districts or subsequently excluded was a political right clearly reserved to the State of Texas by the provisions of the Tenth Amendment. See Johnson v. Hood, 5 Cir., 1970, 430 F.2d 610.

Defendants conclude that there is no substantial constitutional question presented as to require convening of a three-judge court and accordingly that the district court was correct in so holding and in dismissing plaintiffs' suit.

This case is a companion case to Juan Fonseca et al. v. Hidalgo County Water Improvement District No. 2 et al., decided this day, ___F.2d___, where we held that another constitutional attack on a Texas statute was not insubstantial under the tests correlated by the Supreme Court in the recent decision in

Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36. See also our recent decision in Sands v. Wainwright, 5 Cir., 1973, 491 F.2d 417. We are likewise unable to say here that the constitutional attack of plaintiffs is "essentially fictitious," "wholly insubstantial," "obviously frivolous," "obviously without merit," or that "its unsoundness so clearly results from the previous decisions of this [the Supreme] court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

It is necessary, therefore, that this case be remanded to the district court for the organization of a three-judge court, as required by 28 U.S.C. §2281.

Reversed and remanded.

OPINION OF THE

SINGLE-JUDGE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE ROBLES, ISABEL CERVANTES, MARIO RODRIGUEZ, PABLO ALBISO, ALBINO OVIEDO, ESPERANZA SAENZ, RAMIRO GARCIA, JUAN RAMOS, ERASMO MEDELES, MAGDALENO MONTES, AMELIA JARAMILLO MARCOS LANDEROS, and MARTIN GONZALEZ,	X	
VS.	X	CIVIL ACTION NO. 72-B-171
HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, A. E. ELLIOTT, GEORGE HINKLE, E. R. RUSSELL, E. W. GENENWEIN, WILLIAM BUSCH, HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMP. DISTRICT NO. 9, RALPH POWELL, S. H. TURBERVILLE, KIRK SCHWARZ, B. J. HELLER and TOM SOLETHER	X	
and		
JUAN FONSECA, EFREN RAMIREZ and MIGUEL RAMIREZ,	X	

VS.	X
	X
HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, A. E. ELLIOTT, GEORGE HINKLE, E. R. RUSSELL, E. W. GENEWEIN, WILLIAM BUSCH and WALTER D. BRANDT	XCIVIL ACTION XNO. 72-B-180

American Civil Liberties Union Foundation (Melvin Wulf, Joel Gora and Burt Neuborne), of New York City; and American Civil Liberties Union Foundation-South Texas Project (David G. Hall), of San Juan; for Plaintiffs.

Atlas, Hall, Schwarz, Mills, Gurwitz & Bland (Morris Atlas and Harry L. Hall), of McAllen, Texas; for Defendants Hidalgo County Water Improvement District No. 2, Its Officers, Directors and Manager. Smith, McIlheran, McKinney & Yarbrough (Garland F. Smith), of Weslaco, Texas; for Defendants Hidalgo and Cameron Counties Water Control and Imp. District No. 9, and Its Directors.

Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis (Glenn Jarvis and Neil Norquest), of McAllen, Texas; for Amicus Curiae Donna Irrigation District, Hidalgo County Number One.

Neal King, of Mission, Texas; for Amici

Curiae Water Districts

MEMORANDUM AND ORDER

Two civil actions, both contesting the constitutionality of certain procedures taken by two state water districts are now before the Court. The two lawsuits, 72-B-171 and 72-B-180, are hereby consolidated for purposes of this Memorandum and Order.

The first suit, 72-B-171, is brought by Plaintiff Guadalupe Jimenez and thirteen other named Plaintiffs who reside within Defendant Hidalgo County Water Improvement District No. 2 or Defendant Hidalgo and Cameron Counties Water Control and Improvement District No. 9. Certain directors of the two Defendant water districts were also sued, in their official capacities only.

The gravamen of the complaint is that Plaintiffs' land was excluded from Defendant districts without actual personal notice to each individual Plaintiff of the exclusion proceedings. Plaintiffs seek an injunction setting aside the January, 1973, water district elections and ordering Defendants to hold new elections in each of Defendant water districts, since by reason of the exclusion of their lands from such districts, Plaintiffs were unable to vote in the January water

district elections and will be unable to vote in future water district elections. Plaintiffs would also pursue this lawsuit in behalf of a class, such class being all those persons whose lands were so excluded from the Defendant water districts without actual personal notice to the owners thereof, or persons in possession of such lands and who do not want their lands excluded from the Defendant water districts.

Plaintiffs would have this Court enjoin Defendants from excluding "urban property" as defined in Article 8280-3.2, TEX. REV. CIV. STAT. ANN., from the corporate boundaries of Defendant water districts. Plaintiff would also have this Court declare that Article 8280-3.2 is unconstitutional on its face, as applied to Plaintiffs and the class they represent, and that the actions of Defendants in excluding "urban property" pursuant to such statute is null and void and of no effect at law.

Jurisdiction is predicated upon 28 U.S.C. §§1331, 1343, 2201 and 2202; upon 42 U.S.C. §1983; and upon the 5th and 14th Amendments to the Constitution of the United States.

Defendant water districts are political subdivisions of the State of Texas, similar to municipalities and other special purpose districts governed by state statutes. The two districts were organized pursuant to

Article 16, §59 of the Texas Constitution, and are governed by Chapter 51 of the Texas Water Code. The state legislature has delegated to such water control and improvement districts the authority to administer the state's water resources by means of their respective water rights. Water districts have been granted broad powers to effectuate their purposes, e.g., the power to eminent domain, the power to acquire property, the power to tax for certain purposes, the power to borrow money and issue bonds, the power to make contracts and engage in large-scale construction projects, and the power to hire numerous employees to implement the goals of the district and enforce district regulations. See generally Chapter 51, Texas Water Code. In essence, water districts have been endowed by the legislature with all powers necessary to carry out their purposes. Each district operates through a board of directors, each of whom must own land within the district.

Plaintiffs herein complain of the exclusion of their lands without proper notice. A preliminary examination must therefore be made of the validity of the procedure used in excluding such lands. Article 8280-3.2, TEX. REV. CIV. STAT. ANN., the statute challenged in this lawsuit, reads, in pertinent part, as follows:

Art. 8280-3.2 Water Control improvement districts; exclusion of urban property

Section 1. As used in this Act:

(a) "Urban property" means lands which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other nonagricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter pro-

vided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Section 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Provision is then made for hearing and notice, which will be hereinafter discussed.

The procedure used in the alteration of the boundaries of political subdivisions by the state is a political function entirely within the power of the state legislature to regulate. This principle was enunciated by the Supreme Court in 1907, in the case of Hunter v. City of Pittsburgh, 207 U.S. 161. The Court stated, at pages 178 and 179:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as

may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. ... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right

by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

In Detroit Edison Co. v. East China Township School District, 378 F.2d 225 (CA 6 1967), the Court held that any alteration of municipal boundaries was completely discretionary with the State and not confined by any rights secured by the federal constitution. The Fifth Circuit Court of Appeals, in affirming a case appealed from this Court, has stated that in regard to such annexations: "...the annexation of lands to a city has been held without exception to be purely a political matter entirely within the power of the state legislature to regulate". Hammonds v. City of Corpus Christi, Texas, 343 F.2d 162, 163 (CA 5 1965). See also Ocean Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (CA 6 1967). It is therefore clear that the power of political subdivisions of states, such as municipalities and water districts, to alter their boundaries, is almost absolute as far as the federal constitution is concerned.

Plaintiffs complain, however, that the exclusion of their lands in this

instance results in a deprivation of their rights to vote in water district elections. Plaintiffs assert that since the two water districts have the power to supply water for domestic uses, and that since Plaintiffs desperately require water for domestic use, that they are being deprived of the prospective right to use their votes in the future to influence the district to initiate such a domestic water program. This contention is analogous to the one espoused by the plaintiffs in Wilkerson v. Coralville, 41 LW 2638 (CA 8 April 30, 1973). Plaintiffs therein contended that the Equal Protection Clause prohibited a municipality from exercising its powers derived through the state law to refuse to annex an area because the residents there were impoverished and in need of facilities which would be furnished by the city were the area annexed. The Court stated that there is no right of annexation, regardless of the economic status of an area, and that whether a municipality should be permitted to encircle and exclude an impoverished area is a matter of legislative policy for the state. The same principle, applied to the instant case, results in the conclusion that the prospective benefits, if any, asserted by Plaintiffs do not give rise to any constitutionally protected rights; indeed, there is no constitutional right to a domestic water supply. Union Water Supply Corporation v. Vaughn, 355 F.Supp. 211 (SD Tex. 1972), aff'd 474 F.2d 1396 (CA 5 1973).

Plaintiffs herein complain that they are being divested of the right to vote and eventually create a domestic water supply for their properties. This Court, in considering this contention, must recognize that neither of Defendant Districts have ever exercised the power to build and operate treatment plants for the production of potable water for drinking and domestic purposes, but were organizing primarily for and have restricted their activities primarily to providing irrigation water to rural areas and raw river to municipalities and industries. In addition, this Court must take notice that numerous options are open to the inhabitants of the "urban properties" affected by the exclusions, such as the formation of Fresh Water Supply Districts. The Rio Grande Valley Authority and the Rio Grande Valley Pollution Control Authority contempate area-wide domestic water and sewage treatment systems for the entire lower Valley. In addition, it may be noted, and the stipulations submitted by the parties show, that there are water supply corporations now existing which can reach many of the properties of Plaintiffs with existing lines or slight extensions of existing lines. It is not as if Plaintiffs are without better alternatives than the highly speculative procedure of using their votes to influence a political subdivision, i.e., a Defendant District, which lacks the purpose and expertise in the area of domestic water supply of

agencies already in existence.

The voting rights cases cited by Plaintiffs herein are not applicable in this case, as there has been no allegation that the general franchise was granted or denied to one group of persons to the detriment of another. There is no allegation herein that the votes of one group were vested with disproportionate power in comparison to others, or that any minority group was disfranchised. A property owner does not have an absolute constitutional right under the Due Process Clause of the 14th Amendment to vote on proposed municpal annexation. Adams v. City of Colorado Springs, 308 F.Supp. 1397 (DC Colo. 1970), aff'd 399 U.S. 901 (1970); reh.den. 400 U.S. 855 (1970). Certainly this principle applies to the exclusion of Plaintiffs' lands in this case. As far as the prospective right to vote in the water district elections, Plaintiffs herein have shown no deprivation of 14th Amendment magnitude.

The basic issue in this case is one of the sufficiency of notice. Plaintiffs' argument rests largely upon the fact that each individual plaintiff and member of the class Plaintiffs would represent did not receive personal notice of the hearings concerning exclusion of their lands from the districts. Article 8280-3.2, the statute Plaintiffs herein attack, sets forth the requirements for notice prior to exclusion of lands from a water dis-

trict. It has been stipulated between the parties that the provisions of Article 8280-3.2 were complied with by both districts. Plaintiffs contend, however, that Article 8280-3.2 notice is insufficient. This Court does not agree.

Section 3 of Article 8280-3.2 provides for the adoption of a resolution by the Board of Directors of a water district calling for a hearing to determine whether or not all or part of any urban property shall be excluded from the district. The resolution is to set forth a description of the property to be excluded and the date, time, and place such hearing is to be held.

The notice provisions of Article 8280-3.2 are as follows:

> Section 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing

> shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district such publication to be at least ten (10) days prior to the date hearing. In the event railroad right-of-way is involved company by mailing, first class, a true copy of the same, properly addressed as it appears on the last approved county tax roll.

The statute proceeds to provide that such hearing may be continued from time to time until all persons who appear and are entitled to be heard have been so heard and that thereafter the Board of Directors shall determine and find that such urban property is not used or intended to be used for agricultural purposes, that it would be in the best interest of the district to exclude such property and that the owners of a majority in acreage of such urban property do not desire irrigation of their property.

Plaintiffs contend that Article 8280-3.2 is unconstitutional on its face because it does not provide for notice to each individual landowner effected by the exclusion of urban property, railroad, and that Plaintiffs, who are largely of Mexican-American descent, should have received not only individual notice, but notice in the Spanish language.

Notice of the type implented by Article 8280-3.2 is the type provided for in almost all states when personal notice is not required. Examples of some proceedings in Texas whereby notice thereof may be given by publication or posting or both are: 1) the annexation of additional territory by drainage districts or conservation and reclamation districts; Article 8176b, TEX. REV. CIV. STAT. ANN.; 2) Creation of extension of a navigation district; Texas Water Code, Sec. 61.028; 3) Notice of bond elections in Water Control and Improvement Districts is by publication only; Texas Water Code, Sec. 61.034; 4) Cities may annex territory on notice by publication only; Art. 970a, Sec. 6, TEX. REV. CIV. STAT. ANN.; 5) Cities may disannex territory with posting and publication required; Art. 970a, Sec. 10C, TEX. REV. CIV. STAT. ANN.; 6) Creation of Fresh Water Supply Districts; Texas Water Code, Secs. 53.016 to 53.019, inclusive; 7) Exclusion of lands from Fresh Water Supply Districts; Texas Water Code, Sec. 53.233.

The reasons for choosing the method of notice provided in Article 8280-3.2 are manifest. For example, within Hidalgo County Water Control and Improvement District No. 2, Defendant herein, there are some 2,061 property owners owning more than one acre of land in the District. If landowners in excluded areas are entitled to notice, certainly the remaining landowners would be entitled to notice also, as their pro-

perty would be subjected to greater taxes because of the decreased area. There are approximately 2,958 owners of lots in the excluded areas. Personal notice to all landowners in both English and Spanish would mean that some 10,000 notices to over 5,000 owners would have to be sent. A similar problem would confront Defendant District. No. 9.

Plaintiffs complain that insufficiency of notice has deprived them of their right to a hearing. Although the owners of property within the district have no right to be heard on the question of benefits when the boundaries of such district are determined, there is no question that owners of property, under certain circumstances, have a right to a hearing prior to inclusion in a political subdivision. The same would be true as regards exclusions, but regardless, Article 8280-3.2 provides for a hearing and for sufficient notice thereof.

In fixing the boundaries of political subdivisions. "...the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i.e., the amount of the tax which he is to pay". Falbrook Irrigation District v. Bradley, 164 U.S. 112, 174-175 (1896). See also Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939). As the aforementioned cases would indicate, Plaintiffs have not suffered and will not suffer a loss of constitutional dimensions, and therefore the quantum of notice to be afforded Plaintiffs will be gauged accordingly. Plaintiffs' reliance on cases such as Mullane v. Central Hanover Bank and Trust, 339 U.S. 306 (1950), Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956) seems misplaced. Each of those cases involved an existing, tangible property interest, as opposed to what seems to be an intangible, future property interest in this case. Notice similar to the notice provided for in Article 8280-3.2, i.e., by publication, has been upheld in cases concerning the formation of water districts. Orr v. Allen, 245 F. 486 (ND Ohio 1917), aff'd 248 U.S. 35 (1918); San Saba County Water Control and Improvement District No. 1, et al. v. Sutton, 12 SW 2d 134 Tex., Comm'n. App. 1929, jdmt. adopted); Tarrant County Water Control & Improvement District No. 1 v. Pollard, 12 SW 2d 137 (Tex., Comm'n. App. 1929, opinion

adopted). See also Rutledge v. State, 7 SW 2d 1071 (Tex. Sup. 1928); Trimmier v. Carlton, 296 SW 1070 (Tex. 1927).

This Court, therefore, holds that the personal notice to landowners of the exclusion of lands from a water control improvement district is not required, and, therefore, that the notice provisions of Article 8280-3.2 are constitutional.

Plaintiffs also attack Article 8280-3.2 as denying them equal protection of law due to the treatment of railroads as a special favored class. The statute provides for notice to railroads to be given by mail, while other landowners were only to be given notice at the courthouse door, by publication, and by posting two copies of the resolution calling the hearing at locations in or near the urban property proposed for exclusion. There is certainly strong justification for providing for special notice to railroads. Railroads run from coast to coast and throughout Texas. Each of some two hundred fifty-four counties in Texas contain numerous political subdivisions, school districts, cities, and other agencies of the State capable of affecting the railroads' interest through taxes or otherwise. For a railroad company covering a large area, the burden of acquainting itself with the activities of a multitude of state agencies would be disproportionate to the trifling inconvenience to a local authority of apprising the railroad by

mail of its impending action. Such a course is only equitable and is not arbitrary or without a compelling state interest.

Defendants have asserted that a three-judge court is necessary to this case, due to Plaintiffs' attack upon the constitutionality of Article 8280-3.2. "The law is clear that even where there is an otherwise proper constitutional-injunctive challenge to a state statute, a three-judge court can be denied if the constitutional question is plainly insubstantial." Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 441 (CA 5 1973). This Court believes that the constitutional question involving Article 8280-3.2 is insubstantial. A three-judge court is, therefore, not required in this case.

The second case before the Court, Civil Action 72-B-180, was filed against Hidalgo County Water Improvement District No. 2 by Plaintiffs Juan Fonseca, Efren Ramirez, and Miguel Ramirez, all residing within the boundaries of Defendant District. Plaintiffs Fonseca and Efren Ramirez own property within the district; Plaintiff Miguel Ramirez apparently does not. Plaintiffs Juan Fonseca and Efren Ramirez claim that they were denied candidacy in the January, 1973, water district elections in violation of their 14th Amendment rights. Plaintiffs also seek declaratory relief by attacking the constitutionality of Section 51.072 of the Texas Water Code. The suit is brought on behalf of a class, that class being all those persons residing within the cor-

porate territory of Defendant District, who are duly qualified voters under the laws of the State of Texas, and who desire to vote for Plaintiffs Juan Fonseca and Efren Ramirez as candidates for the office of Director of the Defendant District.

At the outset, Plaintiffs' attack on §51.072 must be considered. Section 51.072 provides as follows:

§51.072 Qualifications for Director

> To be qualified for election as a director, a person must be a resident of the state, own land subject to taxation in the district, and be at least 21 years of age.

The two recent Supreme Court decisions of Salyer Land Co. v. Tulare Water District, ___ U.S. ___ (No. 71-1456, March 20, 1973), and Associated Enterprises, Inc. and Johnson Fuel Liners v. Toltec Watershed Improvement District, ___ U.S. ___ (No. 71-1069, March 20, 1973), are dispositive of the instant case. It was in these cases that the Court upheld California and Arizona statutes which restricted voting rights in water district elections to landowners within the districts. The reasoning was that such districts were governmental units of special or limited purpose whose activities had such a disproportionate effect on landowners within the districts that nonlandowners might constitutionally be denied voting rights in district elections. Hidalgo County

Water Improvement District No. 2 is a district similar to those in California and Arizona considered by the Supreme Court in the aforementioned decisions. Although Plaintiffs argue that the powers of a Texas Water Control and Improvement District are much more extensive in that it exercises a broader number of powers and its actions affect non-landowning residents, this Court does not believe that the character of a Texas water district can remove it from the scope of Salyer. In view of the recent pronouncements of the Supreme Court concerning water districts, this Court finds that Plaintiffs' attack on Section 51.072 is plainly insubstantial and a three-judge court is unnecessary.

The constitutional issue being foreclosed against Plaintiffs, the Court must now look to the allegations that Plaintiffs Efren Ramirez and Juan Fonseca, although qualified to become candidates in the water district elections, were wrongfully refused when they attempted to place their names on the ballot. Defendants assert that Plaintiffs filed for office too late.

Time for filing in water district elections is governed by §51.075 of the Texas Water Code, which provides:

§51.075 Application to Get on Ballot

> A candidate for the office of director or other elective office may

> file an application with the secretary of the board to have his name printed on the election ballot. The application must be signed by the applicant or by at least 10 qualified electors of the district and must be filed at least 20 days before the date of the election.

On December 20, 1972, both Plaintiffs Efren Ramirez and Juan Fonseca filed applications for a place on the ballot at the main office of Defendant District. The election was to be held on January 9th, 1973. The general rule in Texas regarding the computation of a period of time is to exclude the first day of a specific period and include the last. 55 Tex. Jur. 2d Time §13 (1964). It may be noted that §51.073 specifically excludes the date of the election. See Murchison v. Darden, 171 SW 2d 220 (Tex. Civ. App. Eastland 1943, writ dism'd). In addition, this Court views the language "at least 20 days" as meaning twenty full days before the date of the election, not portions of a day. See 86 C.J.S. Time §13(5) (1954). The Court recalls from his days as a candidate for the School Board and City Commission that he was required to file the full number of days prior to the date of the election. It being evident that Plaintiffs filed too late for office, they may not prevail in this case. Nothing in this opinion is to be construed as denying landowners within the water district the

right to file in future water district elections as long as the appropriate statutes are complied with.

The foregoing constitutes the Findings of Fact and Conclusions of Law of this Court, and Civil Actions 72-B-171 and 72-B-180 should be, and are hereby dismissed and dropped from the docket of this Court.

The Clerk will send copies of this Memorandum and Order to counsel for the parties.

DONE at Brownsville, Texas, this 15th day of August, 1973.

Reynaldo G. Garza

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE ROBLES, ISABEL CERVANTES, MARIO RODRIGUEZ, PABLO ALBISO, ALBINO OVIEDO, ESPERANZA SAENZ, RAMIRO GARCIA, JUAN RAMOS, ERASMO MEDELES, MAGDELENO MONTES, AMELIA MARAMILLO (sic), MARCOS LANDEROS and MARTIN GONZALEZ	X	
V.	X	Civil Action No. 72-B-171
HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, A. E. ELLIOTT, GEORGE HINKLE, E. R. RUSSELL, E. W. GENENWEIN, WILLIAM BUSCH, HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMP. DISTRICT NO. 9, RALPH POWELL, S. H. TURBERVILLE, KIRK SCHWARZ, B. J. HELLER and TOM SOLETHER	X	

JUDGMENT

The issues in this case have been duly litigated before a properly constituted three-judge court in a hearing held after proper notice, with all the parties hereto by their respective attorneys of record present and participating. After considering the record, the stipulations of the parties, the pleadings, the briefs

and arguments, and all other matters properly before it, the court has concluded that the relief prayed for by the plaintiffs should be denied.

It is therefore decreed that the relief prayed for by any and all of the plaintiffs be, and the same is, denied. It is further decreed that all court costs of this case be taxed jointly and severally against named plaintiffs.

Signed October 2nd, 1975.

THOMAS GIBBS GEE
United States Circuit Judge

REYNALDO G. GARZA
United States District Judge

OWEN D. COX
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, et al.,	:	
Plaintiffs	:	
V.	:	C. A. NO.
HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, et al.,	:	72-B-171
Defendants	:	

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that GUADALUPE JIMENEZ, et al., the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action in favor of Defendants on October 2, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

David G. Hall

PROOF OF SERVICE

I, David G. Hall, one of the attorneys for GUADALUPE JIMENEZ, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of November, 1975, I served copies of the foregoing Notice Of Appeal To The Supreme Court Of The United States on the several parties thereto as follows:

1. On Hidalgo County Water Improvement District No. 2, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Morris Atlas and Mr. Harry Hall, ATLAS, HALL, SCHWARZ, MILLS, GURWITZ & BLAND, P. O. Drawer 1870, McAllen, Texas 78501;

2. On Hidalgo and Cameron Counties Water Control and Improvement District No. 9, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Garland Smith, SMITH, MC ILHERAN, YARBROUGH & GRIFFIN, P. O. Box 416, Weslaco, Texas 78596.

It is further certified that all parties required to be served have been served.

David G. Hall
519 South Texas Avenue
Weslaco, Texas 78596
512/968-9574

Attorney for Appellants